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82-1057

No. ————

IN THE

Supreme Court of the United States

October, 1982

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, CONSOLIDATED SYSTEM BOARD OF ADJUSTMENT 46; BROTHERHOOD OF RAILWAY CARMEN, BURLINGTON NORTHERN JOINT PROTECTIVE BOARD; ALLIED SERVICES DIVISION, BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS; BROTHERHOOD OF RAILWAY SIGNALMEN; GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION NO. 386, BURLINGTON NORTHERN INC.; YARDMASTERS OF AMERICA, BROTHERHOOD OF LOCOMOTIVE ENGINEERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; BURLINGTON NORTHERN GENERAL COMMITTEES OF ADJUSTMENT UNITED TRANSPORTATION UNION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS; and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioners,

vs.

BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE COURTS BELOW

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., 530 F.Supp. 1023 (DC Minn. 1981).

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., Court of Appeals 8th Cir., September 22, 1981, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., USDC, Minn., November 4, 1981, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., USDC Minn., January 5, 1982, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., USDC Minn., January 5, 1982, not reported.

Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., Court of Appeals for the Eighth Circuit, November 18, 1982, No. 82-1136.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit filed its final order in this matter on November 18, 1982. Appendix at page A-15. The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1) of the United States Code.

There was no petition for re-hearing. A motion for stay of mandate was filed on December 10, 1982.

This Court has jurisdiction to review the questions by writ of certiorari in accordance with Title 28, United States Code, Section 1254(1).

STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner labor organizations should have been allowed pursuant to 49 U.S.C. 11705(a) to establish that they have been adversely affected by Respondent Burlington Northern Inc.'s violation of a merger order issued by the Interstate Commerce Commission.

2. Whether the United States District Court and the Court of Appeals for the Eighth Circuit erred in dismissing on jurisdictional grounds Petitioners' Complaint to enforce by injunctive relief an Interstate Commerce Commission merger order which barred formation of the Burlington Northern holding company.

3. Whether the United States District Court should have examined the Interstate Commerce Commission Merger Order to determine on the merits whether injunctive relief should have been granted to Petitioner labor organization in the allegation that the Respondent Burlington Northern Inc. violated the merger order by formation of a holding company.

4. Whether the Court of Appeals for the Eighth Circuit erred in its order directing dismissal of Petitioners' complaint when it held that it was bound by the principle of *res judicata* and therefore refused to reconsider the issues ruled on by the Court of Appeals in the earlier appeal from an order denying Petitioners' motion for preliminary injunction.

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STATUTES INVOLVED

The statutes involved in the present case are contained in the Interstate Commerce Act and are as follows:

> 49 U.S.C. §11702. Enforcement by the Interstate Commerce Commission.
> (a) The Interstate Commerce Commission may bring a civil action—
> (1) to enjoin a rail carrier from violating section 10901-10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;
> (2) to enforce section 10527 or 10930 or 11109 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchaper; * * *
>
> 49 U.S.C. §11703. Enforcement by the Attorney General
> (a) The Attorney General may, and on request of the Interstate Commerce Commission shall, bring court proceedings to enforce this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle and to prosecute a person violating this subtitle or a regulation or order of the Commission or certificate or permit issued under this subtitle. * * *
>
> 49 U.S.C. §11705. Rights and remedies of persons injured by certain carriers.
> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. * * *

Title 28 U.S.C., Section 1336. Interstate Commerce Commission's orders

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission, for the payment of money or the collection of fines, penalties, and forfeitures.

Title 28, U.S.C.. Section 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

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Petitioners,

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BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners above named pray that a Writ of Certiorari issue to review the decrees of the United States Court of Appeals for the Eighth Circuit as entered in the above-entitled matter on September 22, 1981 and November 18, 1982.

OPINONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit are reported as *Brotherhoods, et al v. Burlington Northern Inc. and United States of America.* A copy of each of the two orders is included in the Appendix.

Appendix at pages A-11, A-15. The Eighth Circuit affirmed the lower court's dismissal on jurisdictional grounds on September 22, 1981 and then ordered dismissal of the Complaint on the second appeal by order of November 18, 1982. A copy of each of those orders and a copy of the order of the United States District Court are included in the Appendix.

STATEMENT OF THE CASE

Petitioners are collective bargaining representatives within the meaning of the Railway Labor Act and the Interstate Commerce Act and brought this Complaint in the

United States District Court for the District of Minnesota to enforce the Interstate Commerce Commission order which approved the merger of two railroads under the name of Burlington Northern Inc. The Interstate Commerce Commission proceeding is in Finance Docket No. 28583 (Sub-No. 1F). *Burlington Northern, Inc. - Control and Merger - St. Louis-San Francisco Railway Company*, 360 ICC 788 (1980).

The matter came on for hearing before the Honorable Harry H. MacLaughlin, United States District Court, District of Minnesota, on Tuesday, May 12, 1981. The Court entered an order denying the motion for preliminary injunction on May 14, 1981. The trial court's memorandum order is published as *Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc.*, 530 F.Supp. 1023 (D. Minn.).

The Eighth Circuit held that it has no jurisdiction over the subject matter and dismissed the appeal. The matter was remanded to the United States District Court, which dismissed the Complaint on November 6, 1981 and denied the motion to amend the Complaint on January 5, 1982.

The Court of Appeals for the Eighth Circuit affirmed on November 18, 1982. This Petition seeks review of the two rulings of the Court of Appeals for Petitioners contend that under the Interstate Commerce Act they may seek judicial enforcement of the *Frisco Merger Order.*

A companion case was ruled on by the Circuit in *Brotherhoods v. Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir. 1982), where the Court of Appeals remanded to the Interstate Commerce Commission these unions' petition for an investigation into whether the Burlington Northern Inc. is a holding company controlling two or more separate,

certificated railroad carriers within the meaning of the Interstate Commerce Act.

In the *Frisco Merger Order* of 1980, the Interstate Commerce Commission thoroughly discussed the results of the order approving the merger of the Burlington Northern Inc. and the St. Louis-San Francisco Railway Company. The order pointed out that the B.N. sought authority to issue certain securities and assume certain obligations in connection with the merger; p. 793; and pointed out that the B.N. was diversified in transportation and natural resources with transportation activities including rail, truck, and air freight. P. 795. The B.N. owned all stock of seven carriers and some of the stock in 29 carriers plus all stock in 18 non-carriers. P. 798. The Commission said:

> The financial strength of BN is due in large measure to the existence and development of its non-rail assets. The carrier owns in fee nearly 2.4 million acres in the mountain and Northwestern States and holds mineral rights on an additional 5 million acres. Revenues derived from the mining of taconite, coal, and other minerals, the production of oil and gas, and the harvesting of forest products had become important sources of income during recent years. 360 ICC at 798-799. * * *
>
> The merger also will expand Frisco's financial base and insure that funds are available for maintenance of facilities and equipment. P. 938. * * *
>
> Applicants also state that Frisco's financial base would be expanded, because B.N.'s internally generated funds from non-transportation activities would be available to the merged system. P. 819. * * *

Appendix D, summary of B.N. traffic, facilities, equipment, safety, and financial data includes the following

statement in Table D-7, expenditures for additions and betterments:

> In 1977 BN launched a new 5-year plan that contemplates capital expenditures or about $2 billion for expansion and improvements. About half of the total will be for coal-related projects.
>
> The ability of a railroad to satisfactorily provide transportation services and to adequately rehabilitate its plan and equipment can be affected by its corporate structure. Those in a position to control a railroad's actions can divert the carrier's income, property, and other assets for nonrail purposes. This opportunity exists to a significant degree when a parent holding company controls the railroad.
>
> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations. P. 992-993.

The paragraph last quoted, at p. 993, is the focal point of this litigation to enforce the ICC order which by plain reading bars formation of a holding company.

The Burlington Northern on April 7, 1981 issued a proxy statement for the 1981 annual meeting of the shareholders and announced that the carrier would propose formation of a holding company.

The proxy statement was mailed as planned. There certainly is no longer any emphasis on railroad operations in this conglomerate. The B.N. very frankly pointed out why it wants a broader opportunity for issuing securities. The proxy statement summary states:

> As a common carrier subject to the Interstate Commerce Act, the Railroad can issue securities only with the approval of the Interstate Commerce Commission and only for a carrier purpose. Such limitations prohibit Railroad from issuing securities for the acquisition or development of non-transportation assets. Holding Company would not be subject to such restrictions and would have greater flexibility to finance non-transportation business activities.

The proxy statement went into this matter in greater detail:

> The principal reason for the holding company proposal is to provide a corporate structure designed to facilitate the growth and development of these transportation, natural resources and other non-transportation businesses. * * *
>
> Management believes that development of the Railroad's natural resources and non-railroad properties could be facilitated if transferred to the holding company or other subsidiaries of the holding company. If formation of the holding company is approved by the stockholders, it is likely that some of these resources and properties will be transferred to the holding company, although the extent of such transfers may be limited because of tax considerations.

The trial court denied petitioners' motion for preliminary injunction on January 14, 1981, the day of the shareholders' meeting which authorized the formation of the holding company. As noted, the Court of Appeals dismissed the appeal. The District Court thereafter dismissed the Complaint, and the Court of Appeals for the Eighth Circuit on November 18, 1982 affirmed the dismissal.

The *Frisco Merger Order* was affirmed in *Missouri* -

Kansas - Texas R. R. Co. v. United States, 632 F.2d 392 (5th Cir., 1980), *cert. den. sub nom. Illinois v. United States*, 101 S.Ct. 3005.

The District Court in the present case had jurisdiction to enforce the order by reason of the Interstate Commerce Act, Title 49, United States Code, Section 11705(a) and by reason of the judicial act, Title 28, Section 1336(a). See also 28 U.S.C. Section 2321(b). The Court of Appeals had jurisdiction on the original appeal from the order denying the motion for preliminary injunction pursuant to Title 28, United States Code, Section 1292(a)(1). The Court of Appeals had jurisdiction over the final decision of the District Court pursuant to 28 U.S.C. Section 1291. This Court has jurisdiction to grant the writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1).

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS AS UNIONS HAVE A STATUTORY RIGHT TO ENFORCE THE FRISCO MERGER ORDER.

The unions who are Petitioners in this matter were either directly or vicariously participants in the administrative proceedings resulting in the merger order entered by the Interstate Commerce Commission on April 17, 1930. *Burlington Northern Inc. - Control and Merger - St. Louis-San Francisco Railway Company*, 360 ICC 788. Petitioners officer M. M. Winter and United Transportation Union were specifically named as parties. Three attorneys appeared for the Railway Labor Executives' Association. 360 ICC 792. The Commission Order specifically provided that employees of the two carriers shall be afforded relief set

forth in Appendix M. 360 ICC at 966. That Appendix, as all appendices, was a part of the merger order. It provided in Condition 6 that

> Railroad employees of the merged system and subsidiaries shall be entitled to the standard level of protection, unless an agreement is entered prior to merger, in which case protection shall be at the negotiated level.

The lower courts did not quarrel with the Petitioners' standing. This would seem to well established by Circuit Judge MacKinnon in *United States v. Federal Maritime Commission*, DC Cir., 636 F.2d 792, 79° (1980), which predicated its finding that parties are conclusively interested in an action when they have participated in the administrative proceedings on *Associated Industries v. Ickes*, 2nd Cir., 134 F.2d 694, 699 (1943), vacated as moot, 64 S.Ct. 74.

While the trial court here did not hold that these unions had no interest to bring an action, the trial court erred in holding that the enforcement "* * * would encroach upon the ICC's exclusive jurisdiction." The court based that conclusion upon the Interstate Commerce Act, Title 49, Subchapter III, Sections 11343, 11344, and 11348 by reference to the exclusive authority of the ICC under Section 11341(a). The lower courts made a substantial error in assuming that the enforcement of the Act is identical to the enforcement of a Commission order.

Petitioners believe that there is a substantial, definitive distinction between the enforcement of the Act against violations in general and the enforcement of a specific order.

The Interstate Commerce Act in Section 11705(a) specifically provides that a person injured by reason of a carri-

er's being subject to the ICC and not obeying an order of the Commission may bring a civil action to enforce the order. The new section is, of course, directly derived from the earlier Interstate Commerce Act section codified as 49 U.S.C. 16(12). That section as recodified is 49 U.S.C. 11705(a) which provides as follows:

> A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

The capacity of the individual would seem to be specifically provided in the Judiciary Act, Title 28, Section 2321, which provides in part as follows:

> (b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

The Judicial Code manifestly provides specifically for jurisdiction in the courts to enforce an order.

The Commission specifically provided a bar to the formation of a holding company.

Appendix D, summary of B.N. traffic, facilities, equipment, safety, and financial data includes the following statement in Table D-7, expenditures for additions and betterments:

> In 1977 BN launched a new 5-year plan that contemplates capital expenditures or about $2 billion for ex-

> pansion and improvements. About half of the total will be for coal-related projects.
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> The ability of a railroad to satisfactorily provide transportation services and to adequately rehabilitate its plant and equipment can be affected by its corporate structure. Those in a position to control a railroad's actions can divert the carrier's income, property, and other assets for nonrail purposes. This opportunity exists to a significant degree when a parent holding company controls the railroad.
>
> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations. P. 992-993.

The statements reflect the Commission's understanding that there was to be a merger of all assets and properties and that the two railroads would operate as one with an enormous financial strength backing up this modernization in implementation of the National Transportation Policy.

Petitioners as unions representing employees of the Burlington Northern Inc. as a railroad have attempted through this litigation to enjoin the formation of the holding company by a judicial enforcement of the Commission order which on its face held that "BN will not be in a position to form a holding company for many years due to bond indenture restrictions." 360 ICC at 993.

The courts have specifically sustained the right of an individual to bring a civil action to enforce an order of the Commission. See *Carothers v. Western Transportation Co.*, 7th Cir., 563 F.2d 311 (1977) *cert. denied* 424 U.S. 911. That case held that the individual plaintiff may bring an

action to enforce an order without joining any of the other parties. See also *Pacific Fruit Express Co. v. Akron, Canton and Youngstown R. R. Co.*, 9th Cir., 524 F.2d 1025 (1975), *cert. den.* 96 S.Ct. 1107 (1976). The Court held specifically there that the ICC was within its power promulgating an order and the district court was within its power mandating compliance with that order.

The trial court in this case made a substantial error in relying on *B. F. Goodrich Co. v. Northwest Industries, Inc.*, 3rd Cir., 424 F.2d 1349 (1970), *cert. den.* 400 U.S. 822. That suit involved an attempt to enjoin a violation of Section 5 of the earlier Interstate Commerce Act. The Court held there that it was a collateral attack on the order of the ICC. The Commission had precisely determined the right of Northwest Industries to proceed with its acquisition of Goodrich; and the Goodrich Company had filed the injunction to restrain Northwest Industries from doing so. That is a collateral attack. The Court should make the substantial distinction that the Petitioners are seeking to enforce an order, not seeking to make a collateral attack upon the Commission order.

While it is obvious that there is no statutory grant to private party to bring an action to enjoin such a transaction, Petitioners respectfully urge the Court to hold that the action to enforce the Commission's order is specifically granted to a private party. See Section 11705(a) and 28 U.S.C. Sections 1336 and 2321.

This Court dealt with an analogous situation in *Norfolk and Western Railway Co. v. Nemitz*, 404 U.S. 37 (1972). The employees there had been protected as required by Section 5(2)(f) of the Interstate Commerce Act, presently found in 49 U.S.C. 11347. The merger order there entered

protection for the employees, and the union and the carrier subsequently entered into an agreement modifying that protection. The individuals sued to protect the merger order by injunctive relief. The District Court held that the new agreement was not enforceable because it violated the Act. The Court of Appeals affirmed. This Court affirmed. It would appear that if the individual employees be authorized to protect by injunctive relief the requirements of the Act through the implementation of an order, the collective bargaining representatives, in the present case these Petitioners, should be likewise able to enforce the order.

II.

THE COMMISSION'S STATEMENT BARRING RESPONDENT RAILROAD'S FORMATION OF A HOLDING COMPANY MUST BE CONSIDERED BINDING AND CONCLUSIVE.

Administrative decisions must be considered conclusive with respect to the proceedings which resulted in a specific order. *Valley Mould and Iron Corp. v. National Labor Relations Board*, 116 F.2d 760, 767 (7th Cir., 1941) was favorably quoted as follows in *Brotherhood of R. R. Trainmen v. Swan*, 214 F.2d 56, 59 (7th Cir., 1954):

> Obviously the right to a hearing embraces not only the right to present evidence but also reasonable opportunity to learn the claims of the opposing party and to meet them.

It is absolutely essential that the orders of the Commission be related to what was litigated in the adversary hearing before the Commission. Otherwise, the whole process of notifying parties and requiring evidence would be use-

less. There has to be a relationship between the order and the adversary process. *Clarksburg - Columbus Short Route Bridge Co. v. Woodring,* 89 F.2d 788 (DC Cir., 1936), reversed on other grounds, 302 U.S. 658, held that right to notice and hearing is imperative in judicial or *quasi* judicial proceedings. 89 F.2d at 790. Furthermore, it is essential that the findings of the administrative body be related to and based upon the evidence at the hearing. *United States v. Bradt,* 291 F.Supp. 1022, 1023 (DC Cal., 1968). "The very notion of a hearing, however informal, connotes that the decision maker will listen to the arguments of both sides before basing a decision on the evidence and legal rules adduced at the hearing." *Billington v. Underwood,* 613 F.2d 91, 95 (5th Cir., 1980).

The integrity of the administrative process depends upon an adherence to the due process approach that the parties shall litigate the common issues, that the judicial or *quasi*-judicial body will enter an order based upon those litigated issues and the evidence found in support thereof, and that the parties shall be able to enforce the order. The District Court here held that this was an attempt to enforce the Act. The Court of Appeals held in the first appeal, on September 22, 1981, that the Court lacked jurisdiction over the subject matter. On the second appeal, from the order dismissing the Complaint, the Court of Appeals refused to consider the issues of enforcement of the Commission order and held that its own previous order was *res judicata.*

This Court should grant a writ of *certiorari* to the Court of Appeals for the Eighth Circuit to review the erroneous holding that these Petitioners were attempting to enforce the Act beyond the jurisdiction of the Court instead of actually perceiving that the Petitioners were seeking to en-

force an order in accordance with the Interstate Commerce Act.

III.

THE COURT OF APPEALS ERRED ON THE SECOND APPEAL IN HOLDING THAT IT WAS BARRED FROM CONSIDERATION OF THE MERITS BY REASON OF IT EARLIER DECISION.

The Court of Appeals here in November 18, 1982 in 82-1136 affirmed the lower court's dismissal of Petitioners' Complaint against Respondent Railroad. The Court of Appeals held that it could not reconsider its earlier holding, on the appeal from the order denying the motion for preliminary injunction, which held that the Commission was within its permissible limits in interpreting its own previous order not to prohibit Respondent from forming a holding company. The Court of Appeals in the original appeal, on September 22, 1981, dismissed the appeal from the order denying the motion for preliminary injunction and in effect affirmed the trial court's order which held that the court lacked jurisdiction over the subject matter.

It is well established that the Supreme Court will examine all of the earlier court decisions once the matter reaches this Court. In *Stinson v. Atlantic Coastline R.R. Co.*, 355 U.S. 62 (1958), the Court considered the merits of a claim for injuries under the Federal Employers' Liability Act. An earlier appeal to the Supreme Court of Alabama reversed a plaintiff's verdict and ordered a new trial. The second trial resulted in a verdict for the defendant. The Supreme Court of Alabama affirmed. On review, this Court ordered reinstatement of the verdict on the original trial, which had been reversed by the first appeal to the State Supreme

Court, unless the State Supreme Court shall have further consider matters not disposed of on the first appeal. Cited as authority is *Urie v. Thompson*, 337 U.S. 163 (1949), an injury claim arising under the Federal Employers' Liability Act. This Court examined the first decision of the Missouri Supreme Court although there was a second appeal to that court before review by this Court. 337 U.S. at 171-173. This Court has held that it is settled that the Court may consider questions raised on the first appeal as well as those before the Court of Appeals on a second appeal before review by this Court. *Mercer v. Theriot*, 377 U.S. 152, 153 (1964). Thus, the Court of Appeals here was in error in failing to consider on the second appeal its earlier erroneous decision that the subject matter of the litigation was beyond the Court's jurisdiction.

IV.

THE COURTS NEED NOT DEFER TO THE COMMISSION IN INTERPRETING THE STATUTE.

Petitioners seek to enforce the Commission order on the basis of the Interstate Commerce Act, 49 U.S.C. 11705(a). Petitioners represent employees of respondent railroad. The Commission order is specific that respondent would not be in a position to form a holding company for many years.

There is no need to defer to the Commission for an interpretation of its order in determining whether the Petitioners have a right to enforce the order in accordance with the Act.

The issue before this Court is the standing of Petitioners to enforce an order. This is a legal issue, and the Court need not defer to the Commission in determining proper statutory construction. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

The Commission may enforce its orders by bringing action before the United States Court of Appeals. 28 U.S.C. 1336(a). Because the Commission to enforce its order may bring a lawsuit "is a strong indication that such matters are properly determined by the Court." *Interstate Commerce Commission v. Chicago, Rock Island and Pacific R. R. Co.*, 501 F.2d 908, 912 (8th Cir., 1974). The Court is not bound by the Commission's interpretation of statutes. There is thus no reason to defer to the agency in enforcing this order. See *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 993 (3rd Cir., 1980).

There is nothing in the present case that requires Commission interpretation. The holding is clear and the violation is obvious. The Court of Appeals erred in refusing to grant relief from the error of the trial court.

V.

THE LOWER COURTS ERRED IN (1) DISMISSING ON JURISDICTIONAL GROUNDS AND (2) FAILING TO INTERPRET AND ENFORCE THE COMMISSION ORDER.

Because the Commission in the Frisco Merger Order specifically stated that respondent "BN will not be in a position to form a holding company for many years due to bond indenture restrictions," *Frisco Merger Order*, 360 ICC 788, 993, Petitioners contend that Petitioners were entitled to a hearing in the District Court for the purpose of determining the legal effect of the *Frisco Merger Order* in respect to the formation of the holding company. That various parties, including unions and employees, are authorized and empowered to enforce the Interestate Commerce Act is demonstrated by a plethora of authorities.

The diversity of Circuit Court holdings is best demonstrated by the contrast of the present case in the Court of Appeals for the Eighth Circuit and *Walters v. Roadway Express Inc.*, 557 F.2d 521, (5th Cir., 1977), followed and affirmed in *Walters v. Roadway Express Inc.*, 622 F.2d 162 (5th Cir., 1980). In the earlier of the two decisions, 557 F.2d 521, the Fifth Circuit reviewed the facts in detail. The complaining parties were employees of the company which came into existence by reason of an ICC order which granted control of Roadway over the West Brothers Inc. Roadway transferred drivers of West Brother and directed a dovetailing of seniority, which reduced the seniority of the employees who then became the complaining plaintiffs is the lawsuit against Roadway and the union. The plaintiffs contended that the reduced seniority violated the Commission order. The District Court dismissed the matter because it was within the exclusive jurisdiction of the Commission. The Court of Appeals reversed and directed action which should control the disposition of the case at bar. The Fifth Circuit held that 28 U.S.C. 1336 provided jurisdiction in the District Court to enforce any order of the Commission. Because the plaintiffs there had alleged that the committee action in reducing seniority violated the Commission order, the Complaint therefore sought enforcement of that order and Section 1336 was a jurisdictional basis for the Complaint. Relegated to a footnote was a fascinating element insofar as this present petition is concerned. The footnote, 557 F.2d at 523, pointed out that the hearing examiner had provided for protection of seniority rights in the examiner's recommendation to the Commission, and the examiner stated that "it is unlikely that the interests of employees will be materially adversely af-

fected by the transaction." The Court's comment in that footnote should govern the disposition of the case at bar. The Court stated:

> Whether this statement was embodied in the order and whether it means that the parties must ensure that no adverse effect on employment occurs is a matter for the District Court to decide on remand. Assuming that such a requirement is part of the order, the District Court will also have to determine whether a reduction in the seniority * * * was the 'material adverse effect' envisioned by the hearing examiner. 557 F.2d at 523.

The matter was remanded because there was no jurisdictional defect; and that necessarily required the District Court to evaluate the Commission Order and determine whether the transactions whereby Roadway transferred drivers violated the Commission order. The present case involves a refusal by the District Court and a refusal by the Court of Appeals to review and enforce the Commission order on the basis of jurisdictional defects in the Complaint. *Roadway I* demonstrates the error of the trial court and the Court of Appeals in the present case.

On remand, the trial court complied with the Court of Appeals decision in *Roadway* I. The lower court stated that the Court of Appeals had ruled that it was appropriate for the District Court to determine whether the statement by the examiner had been embodied in the Commission order and whether the parties must ensure against any adverse effect. The District Court found on remand, as affirmed and quoted in Roadway II, *Walters v. Roadway Express Inc.*, 622 F.2d 162 (5th Cir., 1980), that the statement had been made in a *control* hearing, not in the *mer-*

ger hearing as the Court of Appeals had stated. The relevant order contained comment that with the current economic trends, "it is unlikely that the interests of employees will be materially adversely affected by the transactions." The examiner then found that "it has not been shown that the transaction will have a substantial effect upon employees." The District Court then concluded that the only requirement in this subject matter was that the acquisitions effect was to be governed by the applicable collective bargaining agreements. The lower court found no other requirements in either the hearing examiner's report or the Commission order on that subject. Upon examination of the order, the lower court found that there was no basis for the emp'oyee's complaint. The Court of Appeals affirmed in Roadway II. 622 F.2d 162, 165.

The present Petitioners have not had any examination or judicial determination on the merits of their complaint in either the District Court or in the Court of Appeals.

In *Carothers v. Western Transp. Co.*, 554 F.2d 799 (7th Cir., 1977), the plaintiffs were employees of Western and charged Western with having violated an Interstate Commerce Commission Special Permission. Western was the carrier certificated by the Interstate Commerce Commission. The plaintiffs were employees who owned trucks which they leased to the carrier. The Commission issued a Special Permission whereby carriers were directed to increase payments to their lessors for increased field costs. The carrier refused to do so, and the employees sued to enforce the order. The Court of Appeals held that the order involved was not for the payment of money and was thus an action to enforce an order in accordance with Section

16(12), now 49 U.S.C. 11705 of the Interstate Commerce Act, the section involved in the case at bar. The basic jurisdictional fact was that the claims had stemmed from a Commission issuance of the Special Permission. The Complaint was to enforce compliance with that Special Permission, which imposed a liability on the carrier. Section 16(12) authorized such a proceeding. On the petition for re-hearing, *Carothers v. Wes'ern Transp. Co.*, 563 F.2d 311 (1977), the petition was denied and commented on Section 16(12) of the Act, now 49 U.S.C. 11705 as follows:

> We read this section to provide an independent cause of action for either the ICC, the United States, or an injured party, not necessarily requiring the joinder of any one of these potential plaintiffs to a suit brought by one of them. 563 F.2d at 313.

The *Carothers* authorities clearly demonstrate that the order may be enforced at the instant of the individuals, in this case Petitioners labor unions representing employees who participated in and are adversely affected by any violations of the Commission orders.

That parties other than the Commission itself may enforce Commission orders is demonstrated by many authorities. In *Am. Refrigerator Transit Co. v. Atchison, T & S F Ry. Co.*, 430 F. Supp. 1135 (DC Missouri, 1977), the plaintiff was a company which offered protective services to the railroad carrier and sued to enforce a Commission order directing the carrier to negotiate a contract with companies offering protective services. Judgment was entered for the plaintiff in that regard.

Railroads may sue each other to enforce Commission orders. In *Chicago and N.W. Transp. v. Atchison, T&S F*

Ry., 609 F.2d 1221 (7th Cir., 1979), the C&NW sued the ATSF Ry. Co. for costs in providing icing services. The defendant counterclaimed for damages resulting from providing protective services to its refrigerator cars moving over the C&NW property. The C&NW claim was based upon division sheet 7 of the National Perishable Freight Committee, a nationwide contract to which many railroads have subscribed. Jurisdiction was predicated upon 49 USC 11705(b)(2) and (c)(1), which are different from the jurisdictional base for the Petitioners' claim of the case at bar, 11705(a). The Court held that the Santa Fe's counterclaim did not request injunctive relief but did allege jurisdiction because of the allegation that the C&NW had refused to comply with Commission regulations. Such would entitle Santa Fe to equitable relief. 609 F.2d at 1231. If Commission regulations justify equitable relief, it would appear that a Commission order should do the same.

The distinction between enforcement of the Act, which is specifically reserved to the Commission, and enforcement of a Commission order, which by statute is granted to anyone damaged by the order, is mentioned in the dissenting opinion of Circuit Judge McMillian in *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 827 (8th Cir. 1980). The dissent distinguished between the review proceedings and an enforcement action. *Ibid* at 829. The lower courts in the instant proceedings failed all along to appreciate this essential distinction.

This Court affirmed a District Court order enjoining violation of an Interstate Commerce Commission order on the request of individual employees who sued to enjoin the violation by both the carrier and the unions which had agreed to diminish merger guarantees required by the Interstate Commerce Act. Jurisdiction for injunction was

based upon 49 U.S.C. Section 16(12) which, of course, is 49 U.S.C. Section 11705(a). *Norfolk and Western Railway Co. v. Nemitz*, 404 U.S. 37 (1971). The District Court had held that the statute empowered the employees to enforce their rights under the order and need not exhaust any administrative remedies. *Nemitz v. Norfolk and Western Ry. Co.*, 287 F.Supp. 221, 230-231 (DC Ohio. 1968). The Court of Appeals affirmed on jurisdiction and held that the District Court could determine damages. *Nemitz v. Norfolk and Western Ry. Co.*, 436 F.2d 841 (6th Cir., 1971).

This Court should grant a writ of *certiorari* and receive written arguments on the ultimate issue of directing the Court of Appeals to direct the District Court to rule on the merits of these Petitioners' complaint.

CONCLUSION

Petitioners request this Court to grant a writ of *certiorari* or other appropriate writ and to enter its order quashing the decision of the Court of Appeals for the Eighth Circuit which approved the decisions of the United States District Court for the District of Minnesota and stay enforcement of said decisions and order final determination of the same in this proceeding and grant such other and further relief as shall be deemed right and proper to the Court.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

As the attorney for the Petitioners herein, I do hereby certify that pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, I caused three copies of the Petitioners' Petition for a Writ of Certiorari to be served upon the following:

Frank S. Farrell
Burlington Northern Inc.
1111 Third Avenue
Seattle, Washington 98101

Martin M. Lucente
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Lawrence H. Richmond
Deputy Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

Solicitor General
Department of Justice
Washington, D.C. 20530

by United States Mail, postage prepaid, on this 22nd day of December, 1982.

Patrick J. Foley

APPENDIX

United States District Court
District of Minnesota
Fourth Division

Brotherhood of Railway and Airline Clerks, Consolidated System Board of Adjustment 46; Brotherhood of Railway Carmen, Burlington Northern Joint Protective Board; Allied Services Division, Brotherhood of Railway and Airline Clerks; Brotherhood of Railway Signalmen; General Committee of Adjustment, United Transportation Union No. 386, Burlington Northern Inc.; and Yardmasters of America,

Plaintiffs,

vs.

Burlington Northern Inc. and United States of America,

Defendants.

Memorandum Incorporating Findings of Fact, Conclusions of Law, and Order Denying a Preliminary Injunction

Civil 4-81-224

Patrick J. Foley, DeParcq, Anderson, Perl, Hunegs & Rudquist, 565 Pillsbury Building, 608 Second Avenue South, Minneapolis, MN 55402, for plaintiffs.

Frank S. Farrell and Donald E. Engle, Burlington Northern Inc., 176 East Fifth Street, St. Paul, MN 55101, and Martin M. Lucente, Sidley & Austin, One First National

Plaza, Chicago, IL 60670 (of counsel), for defendant Burlington Northern Inc.

Thomas K. Berg, United States Attorney, and Francis X. Hermann, Assistant U.S. Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, and Richard A. Allen, General Counsel, and Lawrence H. Richmond, Attorney, Interstate Commerce Commission, Washington, D.C. 20423 (of counsel), for defendant United States of America.

This matter is before the Court on plaintiffs' motion for a preliminary injunction. This memorandum constitutes the Court's findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a).

Factual Background

Plaintiffs are a number of railroad unions who have collective bargaining agreements with defendant Burlington Northern Inc. (BN). BN is a common carrier which is a Delaware corporation, having its principal place of business in St. Paul. The United States is styled as a nominal defendant.

Plaintiffs request the issuance of a preliminary injunction barring the BN from transforming itself into a holding company[1] "until and unless" the Interstate Commerce Commission (ICC) issues an order allowing the transformation. Plaintiffs' Motion for Preliminary Injunction, ¶ 1. Plain-

[1]The method of transformation is somewhat complicated. The BN has created two companies in Delaware, the Burlington Northern Holding Company (Holding Company), and a wholly owned subsidiary of the Holding Company named Burlington Northern Transportation Company (BNTCO). The scheme is to have BTNCO merge into BN. BN shareholders would exchange their stock for stock in the holding company and the BNTCO stock would be cancelled. The net effect would be that the BN would become a wholly owned subsidiary of the Holding Company. The BN's name would then be changed to Burlington Northern Railroad Company and the Holding Company would change its name to Burlington Northern Inc.

tiffs also request that the Court bar the BN from transferring any assets from itself to any other corporation or holding company or issuing any securities unless the transfer or issuance is approved by the ICC.

On January 26, 1981, the Board of Directors of the BN authorized its management to proceed with the formation of a holding company. On January 28, Richard Bressler, president of the BN, wrote to Darius Gaskins, Jr., chairman of the ICC, and to other ICC members informing them of that decision. The letter stated that the formation of such a holding company did not require ICC approval.

On April 14, 1981, the BN informed its stockholders that the holding company proposal would be voted on at the company's annual meeting scheduled for May 14. The proxy statement sent to the shareholders explained the holding company concept in some detail. Briefly, it indicated that as a common carrier the company in its present form may issue securities only with the approval of the ICC and only for a carrier purpose. A holding company would not be subject to such restrictions and could mort easily finance non-transportation business activities. The goal of the transformation is to enhance the development of non-transportation assets, such as timber, coal, oil and gas.

On April 30, 1981, plaintiffs filed a petition with the ICC asking the Commission to find that the BN transformation must be approved by the ICC and requesting that the transaction be disapproved. The petition stated that "[t]he Commission should act, and it should do so before the shareholders' meeting on May 14, 1981." Petition at 54.[3] Plaintiffs filed this suit the same day and have moved for a preliminary injunction.

---

[3]At oral argument counsel for the United States informed the Court that the ICC plans some type of preliminary determination on plaintiffs' petition on or before May 22, 1981.

Plaintiffs' approach is two-fold. First, they contend that the Court is empowered to and should issue a preliminary injunction under the merger, consolidation, acquisition, and securities provisions of the Interstate Commerce Act. Second, they claim that the Court is empowered to and should issue a preliminary injunction under a specific provision of the Act, 49 U.S.C. § 11705, on the ground that the BN transformation violates the terms of a previous ICC order.[*] The Court has determined that with respect to the first approach, the Court lacks jurisdiction to enter a preliminary injunction. With regard to § 11705, the Court has determined that a preliminary injunction should not issue because plaintiffs have not fulfilled the prerequisites established in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) (*en banc*).

I.

Plaintiffs contend that ICC approval for the BN transformation is required under several provisions within Subchapter III of Chapter 113 of the Interstate Commerce Act: 49 U.S.C. §§ 11343, 11344, and 11348, which cover mergers, acquisitions of control, and consolidations. Plaintiffs also rely on three other sections of the Act: § 11301, dealing with the issuance of securities, and §§ 11361 and 11362, dealing with changes in securities that have already been issued.

At the outset, it is important to understand the nature of the relief plaintiffs request. Plaintiffs request that the Court bar defendant from forming any holding company "until and unless" the Interstate Commerce Commission shall have issued an order allowing the transaction. In es-

[*]This second ground was not urged in plaintiffs' memoranda to the Court, and § 11705 is not mentioned in plaintiffs' complaint. It was first posited at oral argument.

sence, the "until and unless" language urges the Court to make a determination that the BN transformation is one subject to the above-stated stautory provisions and, if consummated without ICC approval, violates the Interstate Commerce Act. The Court believes that such relief would encroach upon the ICC's exclusive jurisdiction.

The first words of Subchapter III, within which are found §§ 11343, 11344, and 11348, are "[t]he authority of the Interstate Commerce Commission under this subchapter is exclusive." 49 U.S.C. § 11341(a). The ICC also has exclusive jurisdiction with respect to §§ 11301, 11361, and 11362, *see* 49 U.S.C. §§ 11301(b)(1) and 11361(a). The enforcement provisions for all of these sections, found at 49 U.S.C. §§ 11701 and 11702, indicate the exclusivity of the ICC's power.[4]

Consequently, the issuance of an injunction "until and unless" the ICC approves the BN transformation would be contrary to Congress' intent as evidenced by the statutory language. *See B.F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1355 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970) (Congress placed complete initial control of acquisitions involving federally regulated carriers in the ICC); *Chicago South Shore & South Bend Railroad v. Monon Railroad*, 235 F.Supp. 984, 986 (N.D.Ill. 1964) (Congress' intent was to create exclusive jurisdiction in the ICC in carrier control matters).

Plaintiffs' fallback position is that the Court should en-

[4]Section 11701 provides that the ICC may begin an investigation on its own initiative or on complaint, but does not provide that a court may in the first instance determine whether a transaction would violate the Act. Section 11702 provides that the ICC may bring a civil action to enjoin a carrier from violating the Act, but makes no mention of a private party starting an action or of any Court authority to enjoin a transaction.

join the BN transformation until the ICC takes some action, one way or the other, on plaintiffs' petition. However, if the Court enjoins the transformation pending ICC action, it necessarily must make some type of assessment as to whether or not plaintiffs will prevail before the ICC. This assessment is precisely the inquiry which is within the ICC's exclusive competence.

Chicago South Shore & South Bend Railroad v. Monon Railroad, 235 F.Supp. 984 (N.D.Ill. 1964), considered this very issue. Plaintiff brought suit to enjoin defendant from making further purchases of plaintiff's stock, "until such time as the Interstate Commerce Commission (ICC) may determine the legality of said acquisition." 235 F.Supp. at 985. Plaintiff argued that such action would not interfere with the primary jurisdiction of the ICC, but would merely prevent irreparable injury until the ICC fully considered plaintiff's petition.

The court refused to grant such relief. It noted that a court, in considering whether to issue a preliminary injunction, must decide whether plaintiff has a significant chance of winning on the merits. Such an inquiry would inject the Court into an area within the ICC's primary jurisdiction. The opinion cited *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658, 669-70 (1963) to the effect that

> [a] court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain.

The Court is confident that the ICC will issue a prompt determination in this matter, as indicated by counsel for the United States, justifying the Court's deference to the Commission's exclusive jurisdiction.[4]

II.

Plaintiffs' position that the BN transformation violates the ICC's order in *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Company*, 360 I.C.C. 788 (1980) (the "Frisco" order) remains to be considered. Jurisdiction arguably exists under 49 U.S.C. § 11705(a), which provides in part that

> [a] person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . does not obey an order of the Commission . . . may bring a civil action to enforce that order under this subsection.

Without deciding whether the Court has jurisdiction to enjoin the BN transformation under 49 U.S.C. § 11705(a), it is clear that plaintiffs have not met the prerequisites for the issuance of preliminary relief. The U.S. Court of Appeals for the Eighth Circuit elaborated on the factors to be considered in deciding whether to issue a preliminary injunction in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*). The Court must consider: (1) the threat of irreparable harm to the plaintiff; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other

[4]The ICC apparently has the authority to grant quick, temporary relief when necessary. *See Amoskeag Co. v. Interstate Commerce Commission*, 590 F.2d 388 (1st Cir. 1979) (cease and desist order entered seven days after tender offer).

parties litigant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.

In this case, the second and forth factors cut neither for nor against the issuance of an injunction. However, the first and third factors militate against the relief requested by plaintiffs.

Plaintiffs' basic fear is that the creation of a holding company eventually would lead to the transfer of certain of the railroad's non-transportation assets to holding company subsidiaries, thereby weakening the railroad's financial position. Allegedly this would endanger the "complex and large wage guarantees due from the defendant railroad to the plaintiff's [sic] union members as a result of the various mergers resulting in the present Burlington Northern Inc." Complaint, ¶ 5.

If the Court issued an injunction based on this fear it would act as a seer or soothsayer. Plaintiffs have provided no evidence as to whether asset transfers will occur or when they will occur. Even if such transfers some day come to pass, the Court has no data to substantiate plaintiffs' premonitions that such transfers would render the railroad impotent to fulfill its obligations to its employees.

The Court is especially reticent to find irreparable harm given that plaintiffs have petitioned the ICC for relief. If the BN transformation contradicts the Frisco order, the ICC has the power to make an appropriate supplemental order if cause exists, 49 U.S.C. § 11351. In its Frisco order, the ICC reserved the right to make supplemental securities decisions under 49 U.S.C. § 11301(d)(1). 360 I.C.C. a 965. Consequently, plaintiffs have not at this time shown that a preliminary injunction is necessary to prevent irreparable harm.

With respect to plaintiffs' chances of prevailing on the merits, the Court has doubts as to the strength of plaintiffs' § 11705 claim. The only specific mention of the holding company concept in the Frisco decision that plaintiffs have brought to the Court's attention reads as follows:

> The ability of a railroad to satisfactorily provide transportation services and to adequately rehabilitate its plant and equipment can be affected by its corporate structure. Those in a position to control a railroad's actions can divert the carrier's income, property, and other assets for nonrail purposes. This opportunity exists to a significant degree when a parent holding company controls the railroad.
>
> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the oppotrunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations.

This statement is found in Appendix D to the ICC decision, 360 I.C.C. at 992-92. Apparently the ICC did not provide as a condition for approval of the Frisco merger that the BN could not form a holding company, for the holding company concept is mentioned neither in the discussion of conditions, 360 I.C.C. at 950-60, nor in the formal findings and order, 360 I.C.C. at 960-61, 965-67. That the ICC theorized that the BN would not be in a position to form a holding company for "many years" may or may not have been one consideration that led that Commission to approve the merger, but the Court does not believe that mere

changes in the factual circumstances underpinning an ICC decision constitute disobedience of the order under § 11705.

Therefore, because plaintiffs have not demonstrated a real threat of irreparable harm or a significant probability that they will succeed on the merits of their claim under § 11705, a preliminary injunction would be inappropriate.

ORDER

Accordingly,

IT IS ORDERED that plaintiffs' motion for a preliminary injunction be and hereby is denied.

Dated: May 14, 1981.

/s/ Judge Harry H. MacLaughlin
United States District Court

United States Court of Appeals

For The Eighth Circuit

No. 81-1550

Brotherhood of Railway and Airline Clerks, Consolidated System Board of Adjustment 46; Brotherhood of Railway Carmen, Burlington Northern Joint Protective Board; Allied Services Division, Brotherhood of Railway and Airline Clerks; Brotherhood of Railway Signalmen; General Committee of Adjustment, United Transporation Union No. 386, Burlington Northern Inc., and Yardmasters of America,

Appellants,

vs.

Burlington Northern Inc. and United States of America,

Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: September 16, 1981

Filed: September 22, 1981

Before LAY, Chief Judge, HEANEY and ROSS, Circuit Judges.

PER CURIAM.

Plaintiffs originally sought injunctive relief in the district court to enjoin the Burlington Northern Inc. from

creating a holding company and from transferring assets or issuing securities "until and unless" the Interstate Commerce Commission (ICC) approved the transactions. The district court, in denying relief. held that the court lacked jurisdiction and that the plaintiffs failed to meet the prerequisites for a preliminary injunction as set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). *Brotherhood of Ry. and Airline Clerks v. Burlington Northern Inc.*, 530 F.Supp. 1023, 1026-28 (D. Minn. 1981).[1] Plaintiffs appeal from the district court's denial of injunctive relief, and the railroad moves to dismiss the appeal on grounds of mootness and collateral attack.

This court finds that it lacks jurisdiction over the subject matter and this appeal is, therefore, dismissed. *See Augsburger v. Brotherhood of Locomotive Eng'rs.*, 510 F. 2d 853, 857 860 (8th Cir. 1975).

A true copy.

ATTEST:

CLERK U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[not to be published]

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[1]Thereafter, in a separate proceeding, the ICC denied the plaintiffs' petition for investigation, finding no requirement of ICC approval and no violation of the merger order. A petition to review the ICC June 8, 1981, order, *Brotherhood of Ry. and Airline Clerks*, No. 81-1661, is now pending in this court.

Order of United States District Court

Harry H. MacLaughlin

November 4, 1981

The Court on May 14, 1981, issued an order in the above captioned matter which denied the plaintiff's motion for a preliminary injunction. The Court held that it lacked jurisdiction to enter a preliminary injunction and that the plaintiff had failed to fulfill the prerequisites established in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc). On appeal the United States Court of Appeals for the Eighth Circuit held that it lacked jurisdiction over the subject matter and dismissed the appeal. *Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc.*, No. 81-15509 September 22, 1981).

Based upon the Eighth Circuit's decision, the Court finds that this suit should be dismissed.

Accordingly, IT IS HEREBY ORDERED that this action is dismissed.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: November 4, 1981

Order of United States District Court

Harry H. MacLaughlin

January 5, 1982

The Court on November 4, 1981, issued an order in the above captioned matter which dismissed this suit. The

plaintiffs have moved for recission of that order and for leave to file an amended complaint.

The Court has considered the memorandum submitted by the parties and finds the plaintiffs' argument to be without merit. In essence, the plaintiffs are arguing that the United States Court of Appeals for the Eighth Circuit erred in its ruling in *Brotherhood of Railway and Airline Clerks v. Burlington Northern*, No. 81-1550, (September 22, 1981), which was the basis for this Court's November 4, 1981, order. Such a claim is inappropriate in this forum. Following the Eighth Circuit's clear ruling, nothing remained of the plaintiffs' complaint. Thus, dismissal was appropriate.

IT IS HEREBY ORDERED that the plaintiffs' motion to vacate the Court's order dated November 4, 1981, and to file an amended complaint is denied.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

United States Court of Appeals

For The Eighth Circuit

No. 82-1136

Brotherhood of Rail and Airline Clerks, Consolidated System Board of Adjustment 46; Brotherhood of Rail Carmen, Burlington Northern Joint Protective Board; Allied Services Division, Brotherhood of Rail and Airline Clerks; Brotherhood of Rail Signalmen; General Committee of Adjustment, United Transportation Union No. 386, Burlington Northern Inc.; and Yardmasters of America,

Appellant,

vs.

Burlington Northern Inc. and United States of America,

Appellees.

On Appeal from the United States District Court
for the District of Minnesota

Submitted: November 9, 1982

Filed: November 18, 1982

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

The principal question presented on this appeal is whether the District Court abused its discretion in refusing to

allow the plaintiffs, after the entry of judgment against them, to amend their complaint to assert a new claim under the Land Grant Act of July 2, 1864, 13 Stat. 365. Having considered the briefs, record, and argument of counsel, we hold that there was no abuse of discretion.

Plaintiffs also urge that this Court erred in *Brotherhood of Ry. & Airline Clerks v. Burlington Northern, Inc.*, 671 F.2d 1085 (8th Cir. 1982), which held that the ICC was within permissible limits in interpreting one of its own previous orders not to prohibit Burlington Northern's formation of a holding company. That holding is now *res judicata*. We should have no right to reexamine it even if we thought it was mistaken, which we do not. Plaintiffs' remedy was to seek review in the Supreme Court, and they did not do so. See also our prior order in the instant case, *Brotherhood of Ry. & Airline Clerks v. Burlington Northern, Inc.*, No. 81-1550 (8th Cir. Sept. 22, 1981) (per curiam), *aff'g* 530 F. Supp. 1023 (D. Minn. 1981).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not to be published.]

Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1057

IN THE

Supreme Court of the United States

October Term, 1982

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Petitioners,

vs.

BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC., IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that the issues raised by petitioners relating to the Interstate Commerce Commission's order approving the merger of the Burlington Northern and the Frisco were barred by basic principles of *res judicata*?

2. Whether the Court of Appeals correctly concluded that the District Court did not abuse its discretion when it refused to vacate a judgment of dismissal to permit petitioners to amend their complaint to assert a new claim under the Land Grant Act of 1864, 13 Stat. 365?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1057

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Petitioners,

vs.

BURLINGTON NORTHERN INC. and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC., IN OPPOSITION

STATEMENT OF THE CASE

Petitioners are a number of railroad unions which have collective bargaining agreements with the former Burlington Northern Inc., now Burlington Northern Railroad Company (BN). BN is a common carrier incorporated in Delaware, and has its principal place of business in St. Paul, Minnesota.

In January, 1981, BN's Board of Directors authorized its management to proceed with formation of a holding company and subsequently informed its stockholders that the holding company proposal would be voted on at the company's annual meeting scheduled for May 14.

On April 30, 1981, petitioners filed suit in the U.S. District Court for the District of Minnesota and moved for a preliminary injunction barring formation of a holding company, transfer of assets from BN to any other corporation, or issuance of any securities, unless and until approval was obtained from the Interstate Commerce Commission (ICC). Petitioners alleged that such actions without ICC approval would violate Sections 11343-11345 of Title 49 and other provisions of the Interstate Commerce Act and would also violate the Merger Order in *Burlington Northern Inc. — Control and Merger — St. Louis-San Francisco Railway Company*, 360 ICC 788, 965-967 (1980), *aff'd sub nom., Missouri-Kansas-Texas Rail - Road Company* v. *United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (May 26, 1981).

In a decision rendered on May 14, 1981, the District Court concluded that the statutory sections cited by petitioners conferred exclusive jurisdiction on the Interstate Commerce Commission to redress alleged violations, and that petitioners could not initiate judicial proceedings for that purpose. With respect to petitioners' asserted right to enforce the Commission's order approving merger of the Burlington Northern and the St. Louis-San Francisco Railway Company, the District Court concluded that petitioners had failed to establish irreparable injury or a likelihood of success on the merits. *Brotherhood of Railway and Airline Clerks, Consolidated System Board of Adjustment 46* v. *Burlington Northern Inc.*, 513 F. Supp. 1023 (D. Minn. 1981).[1]

On appeal from the District Court's order, the Court of Appeals for the Eighth Circuit held that it lacked jurisdiction

[1] The holding company transaction was approved by Burlington Northern stockholders and was consummated on May 14, 1981.

over any of the subject matter and dismissed the appeal. *Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 294 (8th Cir. 1981.). The jurisdictional issues embraced all of the statutes ruled on by petitioners as well as the Burlington Northern-Frisco Merger Order. The Court relied in part on *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 857, 860 (8th Cir. 1975), which held that the doctrine of primary jurisdiction requires an agency to determine in the first instance whether its own order has been carried out, with subsequent judicial review of the agency's determination available to the petitioners.

Upon receipt of the mandate from the Court of Appeals, the District Court entered a judgment dismissing the action previously filed by petitioners.

Petitioners then sought vacation of the order of dismissal and leave to file an amended complaint which was denied by the District Court. The Court held that the order previously entered by the Court of Appeals had determined the issue of jurisdiction and that the order of dismissal merely responded to the Court of Appeals' prior ruling. The District Court stated that the petitioners' basic complaint was with the prior determination by the Court of Appeals regarding jurisdiction and that petitioners were merely attempting to reargue in the District Court the validity of the decision by the reviewing Court.

Petitioners appealed again to the Court of Appeals for the Eighth Circuit, claiming that the District Court's dismissal had deprived them of an opportunity to amend their complaint to assert a new claim under the Land Grant Act of July 2, 1864, 13 Stat. 365, and that petitioners' allegations regarding violations of the Burlington Northern-Frisco Merger Order stated a claim within the jurisdiction of the District Court. On November 18,

1982, the Court of Appeals, in a *per curiam* decision, held that the District Court had not abused its discretion when it refused to allow petitioners, after entry of a judgment against them, to amend their complaint to assert a new claim under the Land Grant Act. The Court of Appeals also held that petitioners were barred by basic principles of *res judicata* from continuing to litigate the issue of BN's compliance with the Frisco Merger Order. The Court of Appeals added that, in any event, it was convinced that its prior disposition of that issue was correct and did not warrant reconsideration.

In the meantime, petitioners were also seeking relief before the Interstate Commerce Commission. Concurrently with the initiation of the litigation in the District Court on April 30, 1981, petitioners sought an order from the Interstate Commerce Commission which would have barred formation of the proposed holding company unless and until approved by the Interstate Commerce Commission. Petitioners argued that the proposed holding company transaction violated (1) the Interstate Commerce Act; (2) the Commission's order authorizing the merger of the Burlington Northern and St. Louis-San Francisco Railway Company; and (3) certain restrictions in bonds issued by BN's corporate predecessors in 1896. In June, 1981, the Commission denied the petition, holding that the transaction in question did not violate the Act or the Burlington Northern-Frisco Merger Order, and that petitioners lacked standing to enforce the bond restrictions.

Petitioners sought judicial review of the Commission's decision, but in *Brotherhood of Railway and Airline Clerks, et al.* v. *Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir. 1982), the Court of Appeals affirmed the Commission's decision in virtually

all respects.[2] In particular, the Court specifically affirmed the Commission's conclusion that the holding company transaction did not violate the Frisco Merger Order. 671 F.2d at 1088. Petitioners did not seek review of the Court's decision.[3]

ARGUMENT

The petition for certiorari seeks review of the decision of the Court of Appeals filed on November 18, 1982. The *per curiam* decision of the Court held that the District Court did not abuse its discretion when it refused to allow petitioners, after entry of a judgment against them, to amend their complaint to assert a new claim under the Land Grant Act of July 2, 1864. The Court of Appeals also held that petitioners were barred by the doctrine of *res judicata* from raising again issues involving Burlington Northern's compliance with the Frisco Merger Order.

Neither of the issues resolved by the Court of Appeals involves matters appropriate for consideration by this Court on certiorari. Moreover, the decision of the Court of Appeals was clearly correct in all respects and does not warrant review by this Court.

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[2] The Court remanded the case for further proceedings on the narrow questions of whether BN actually controlled several terminal and switching railroads at the time the holding company was formed, and if so, whether the ICC had jurisdiction over the holding company transaction. That issue is pending before the Commission.

[3] Shortly after initiating the described proceedings in the District Court and the Interstate Commerce Commission, petitioners also filed an action in the United States District Court for the Western District of Washington. The complaint in this third proceeding duplicated petitioners' allegations in the Minnesota action and also asserted claims under the Land Grant Act of 1864. *Citizens Committee to Save The Land Grant Railroads; Brotherhood of Railway and Airline Clerks, et al.*, No. C 81-566C (Wash. 1981). The District Court dismissed this action on December 30, 1981, and the matter is now on appeal before the Court of Appeals for the Ninth Circuit.

Petitioners seek certiorari on the basis of questions which are not in fact present. As the preceding statement and the following argument demonstrate, the issues as to which petitioners seek review were decided by the Court of Appeals in two previous decisions disposing of appeals by petitioners. In neither instance did petitioners seek review by this Court. Accordingly, the issues raised by the present petition are not now subject to review and would not in any event warrant exercise of this Court's certiorari jurisdiction.

1. The Court of Appeals' Application of The Doctrine of *Res Judicata* Was Clearly Correct and Does Not Present Issues Appropriate for Review by This Court.

In the proceedings before the Court of Appeals, petitioners argued that the action which had been dismissed by the District Court remained a viable proceeding to enforce compliance with the order of the Interstate Commerce Commission approving the Burlington Northern-Frisco merger. Petitioners recognized that the Court of Appeals had ruled against them on this issue in its prior decisions but urged that the Court had erred in this respect. In response to these contentions, the Court of Appeals held that, because petitioners had failed to seek further review of its prior orders, the doctrine of *res judicata* barred further litigation. The Court added that it considered its prior determinations correct in any event, even if it were disposed to review them as petitioners had requested.

An examination of the prior decisions by the Court of Appeals clearly demonstrates that the *res judicata* ruling was correct and properly disposed of petitioners' contentions.

In *Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 294 (1981), the Court of Appeals, citing the *Augspurger* case, held that petitioners' action seeking to

enforce compliance with the Frisco Merger Order was not within the subject matter jurisdiction of the courts, but was instead subject to the exclusive jurisdiction of the Interstate Commerce Commission. There simply is no other permissible reading of the Court's dismissal of petitioner's first appeal (A-12). As the District Court noted when it subsequently denied petitioners' motion to vacate its dismissal order:

> "Following the Eighth Circuit's clear ruling, nothing remained of the plaintiffs' complaint." (A-14)

It is also clear that petitioners did not seek review of that determination by the Court of Appeals, and that the issue was thus resolved on a final and binding basis by the Court of Appeals. Fundamental principles of *res judicata* clearly preclude further litigation of that issue by the petitioners.

The other prior decision of the Court of Appeals relating to compliance with the Burlington Northern-Frisco Merger order (*Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 671 F.2d 1085 (1982)) was rendered on review of the holding by the Interstate Commerce Commission that formation of the holding company did not violate the Burlington Northern-Frisco Merger Order.[4] The Court of Appeals concluded that

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[4] Petitioners have recognized in the litigation instituted in the Western District of Washington that the decisions of the Court of Appeals have conclusively determined that petitioners cannot seek enforcement of the Burlington Northern-Frisco Merger Order in an independent judicial action. Thus, the complaint filed in the Western District of Washington duplicated petitioners' allegations in this case regarding non-compliance with the Commission's Order approving the Burlington Northern-Frisco merger. The District Court for the Western District of Washington dismissed those claims on the basis of the prior decision of the Court of Appeals. Although petitioners in the Washington litigation have taken an appeal from the Court's dismissal of the claims under the Land Grant statutes, they have not appealed from the dismissal of their claims regarding non-compliance with the Burlington Northern-Frisco Merger Order. Consequently, the District Court's dismissal of those claims in the Washington litigation is final and conclusive.

the Commission's interpretation of its own order was reasonable, 671 F.2d at 1088. Petitioners did not seek review of that determination and it thus became final and conclusive, again calling into operation fundamental principles of *res judicata*. Thus, in the course of this litigation, the Court of Appeals had previously ruled that petitioners' claims regarding Burlington Northern compliance with the Frisco Merger Order were not subject to the jurisdiction of the federal courts and had also ruled that those claims had been appropriately denied and found to be without merit by the agency with the exclusive authority to make that determination. In these circumstances, the Court of Appeals properly refused to reconsider its prior holdings and correctly applied the basic principles of *res judicata*.

Petitioners' statement of "Questions Presented" simply ignores these prior determinations and seeks to treat the most recent order of the Court of Appeals as the dispositive decision. Each of the questions argued by petitioners involves the propriety of resorting initially to the District Court for relief based on a claim of non-compliance with an ICC order approving a merger of interstate carriers. It is clear, however, that the substantive decisions on each of these questions were rendered by the Court of Appeals months before its decision of November 18, 1982, and that the time for seeking certiorari as to these prior decisions has expired.

The only possible limited exception is the question relating to *res judicata*. As the preceding discussion shows, the Court of

Appeals was correct in its application of that doctrine. Moreover, the issue thus resolved does not warrant the exercise of this Court's certiorari jurisdiction.[5]

2. The Court Of Appeals Correctly Concluded That The District Court Did Not Abuse Its Discretion When It Refused To Vacate A Judgment of Dismissal To Permit Petitioners To Amend Their Complaint.

As the preceding statement shows, petitioners' motion for leave to amend was filed subsequent to the entry of a judgment of dismissal by the District Court. The judgment of dismissal was clearly required by the mandate of the Court of Appeals following the decision of that Court in *Brotherhood of Railway and Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 492 (1981). As the District Court noted, "Following the Eighth Circuit's clear ruling nothing remained of the Plaintiffs' complaint" (A-14). In these circumstances, the matter of permitting an amended complaint was clearly committed to the sound discretion of the District Court and its decision should be overturned only on a showing of a gross abuse of that discretion. *Christophedes* v. *Porco*, 289 F.

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[5] Petitioners' reliance on cases involving subsequent proceedings in a trial court following an interlocutory appeal is wholly misplaced (Pet. pp. 14-15). In the present case, the 1981 decision of the Court of Appeals regarding subject matter jurisdiction fully disposed of petitioners' claims for relief and effectively terminated the proceeding. Moreover, the Interstate Commerce Commission's determination that petitioners had failed to establish a violation of the Frisco Merger Order, affirmed on review by the Court of Appeals in early 1982, was rendered in a separate proceeding and consequently is not subject to review in the present case as an interlocutory determination. *Terry v. Sharon*, 131 U.S. 40; *Sage v. Central R. Co.*, 99 U.S. 334. In any event, the cases cited by petitioners merely recognize *this Court's* power to review prior interlocutory orders of lower courts which are involved in the decision under review. They do not require lower appellate courts to review their *own* prior determinations in the same or related proceedings in deciding an appeal.

Supp. 403, 408 (S.D.N.Y. 1968); *Kelsey* v. *Minnesota*, 565 F.2d 503, 507 (8th Cir. 1977). There is absolutely no basis for concluding that such an abuse of discretion occurred in this case.

It must be emphasized first that the order of dismissal had no effect on petitioners' rights to pursue in a separate proceeding any claims under the Land Grant statute of 1864 (as indeed they have done) because the dismissed complaint did not raise any issues pertaining to that statute. Accordingly, the District Court's discretion in the day-to-day management and control of its docket clearly permitted the determination that resurrection of the dismissed action should not be permitted and that leave to file an amended complaint should be denied.

In making this determination, the District Court could also properly take into account the fact that petitioners had already asserted their Land Grant claims in the proceedings pending before the United States District Court at Seattle, Washington. The multiplicity of actions which would have resulted from the proposed amended complaint fully justified the lower court's refusal to vacate the order of dismissal. In all respects, therefore, the Court of Appeals was correct in affirming the lower court's refusal to vacate the previously entered order of dismissal in order to permit the filing of an amended complaint. The order of the Court of Appeals thus presents no issues warranting review by this Court on certiorari.

CONCLUSION

The petition for writ of certiorari to review a decision of the Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1057

In the Supreme Court of the United States

OCTOBER TERM, 1982

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, ET AL., PETITIONERS

v.

BURLINGTON NORTHERN INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that principles of res judicata preclude petitioners from further litigating the question whether Burlington Northern violated an order of the Interstate Commerce Commission.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1982. The petition for a writ of certiorari was filed on December 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1981, the directors of Burlington Northern Inc., then a rail common carrier, decided to restructure Burlington Northern by transferring ownership of the railroad to a newly formed holding company. This restructuring was intended to provide Burlington Northern with greater flexibility in developing its considerable nontransportation assets, because the holding company, as a non-

carrier, could issue securities without first obtaining the approval of the Interstate Commerce Commission. Petitioners, several labor unions representing Burlington Northern employees, challenged the restructuring before both the Interstate Commerce Commission and the United States District Court for the District of Minnesota.

a. *The Commission proceedings* - Petitioners argued before the Commission that the proposed restructuring violated: (1) the Interstate Commerce Act; (2) the Commission's previous order authorizing the merger of the Burlington Northern with the St. Louis-San Francisco Railway Company (the "Frisco Merger Order")[1]; and (3) restrictions contained in certain bonds issued in 1896 by Burlington Northern's corporate predecessors. In June 1981, the Commission rejected petitioners' arguments, concluding that the Burlington Northern restructuring did not violate the Interstate Commerce Act or the Frisco Merger Order. The Commission also concluded that petitioners lacked standing to challenge the restructuring on the basis of the bond restrictions.

Petitioners sought judicial review of the Commission's order. In *Brotherhood of Railway & Airline Clerks* v. *Burlington Northern Inc.*, 671 F.2d 1085 (8th Cir. 1982) ("*BRAC I*"), the court of appeals affirmed the Commission's decision in virtually every respect.[2] The court specifically affirmed the Commission's conclusion that the Burlington Northern restructuring did not violate the Frisco

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[1] *Burlington Northern Inc.—Control & Merger—St. Louis-San Francisco Ry.*, 360 I.C.C. 783, aff'd, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981).

[2] The court remanded to the Commission for further proceedings on the narrow question whether Burlington Northern actually controlled several terminal and switching railroads at the time the holding company was formed. 671 F.2d at 1090-1091. The Commission recently decided that question. *Burlington Northern Inc.—Control & Merger—St. Louis San Francisco Ry.*, 366 I.C.C. 862 (1983). That decision does not affect the questions raised in this petition.

Merger Order. 671 F.2d at 1088. Petitioners did not seek review by this Court of the *BRAC I* decision.

b. *The district court proceedings* - At the same time petitioners were seeking relief from the Commission, they also sought an injunction against the holding company transaction in the district court. As in the Commission proceedings, petitioners argued that the Burlington Northern restructuring would violate both the Interstate Commerce Act and the Frisco Merger Order. The district court denied petitioners' motion for preliminary injunction in *Brotherhood of Railway & Airline Clerks* v. *Burlington Northern Inc.*, 513 F. Supp. 1023 (D. Minn. 1981) ("*BRAC II*") (Pet. App. A-1 to A-10), on the grounds that it lacked jurisdiction to consider the alleged violations of the Interstate Commerce Act and that petitioners had not met the requirements for injunctive relief based on alleged violations of the Frisco Merger Order.[3]

Petitioners appealed the denial of their motion for preliminary injunction. The court of appeals dismissed the appeal on the ground that it lacked subject matter jurisdiction. *Brotherhood of Railway & Airline Clerks* v. *Burlington Northern Inc.*, 664 F.2d 294 (8th Cir. 1981) ("*BRAC III*") (Pet. App. A-11 to A-12). The court of appeals relied on *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853, 857, 860 (8th Cir. 1975), in which it had held that the doctrine of primary jurisdiction normally requires that an agency determine in the first instance whether its own order has been carried out, with subsequent judicial review by (what would then have been) a three-judge district

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[3]On May 14, 1981, following the district court's denial of a preliminary injunction, the holding company transaction was approved by Burlington Northern stockholders and was consummated. See Burlington Northern Brief in Opposition at 2 n.1.

court.[4] As in the case of the *BRAC I* decision, petitioners did not seek review by this Court.

c. *Petitioners' attempt to reinstate the district court proceedings* - Following dismissal of the appeal, the district court dismissed petitioners' action (Pet. App. A-13). Several months later petitioners moved to vacate dismissal of their action on the grounds that it operated to cut off discovery, that it deprived petitioners of the opportunity to amend their complaint to allege a new claim that formation of the holding company violated the Land Grant Act of 1864, ch. 217, 13 Stat. 365, and that it prevented petitioners from reasserting their earlier claims. The district court denied petitioners' request (Pet. App. A-13 to A-14), on the ground that their arguments essentially constituted a claim that the court of appeals had erred in *BRAC III*, and that the district court could not entertain such a claim.

Petitioners again appealed, arguing that the district court had jurisdiction to enforce the Commission's Frisco Merger Order and that it erred in refusing to allow petitioners to amend their complaint to add the new Land Grant Act claim. In a per curiam order (Pet. App. A-15 to A-16), the court of appeals affirmed, holding that the district court did not abuse its discretion when it denied petitioners' request to amend their complaint. The court of appeals also held that principles of res judicata precluded petitioners from continuing to litigate the question of Burlington Northern's compliance with the Frisco Merger Order and that, in any event, that question had been decided correctly in previous decisions.

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[4]At the time *Augspurger* was decided in 1975, ICC orders were reviewed by three-judge district courts pursuant to 28 U.S.C. 2321 *et seq.* The courts of appeals now have exclusive jurisdiction to review Commission orders. See Pub. L. No. 93-584, 88 Stat. 1917.

Petitioners seek review of this most recent order of the court of appeals.

ARGUMENT

Petitioners seek review of a per curiam order (Pet. App. A-15 to A-16) in which the court of appeals held (1) that the district court had not abused its discretion in refusing to allow petitioners to amend their complaint to include a claim based on the Land Grant Act of 1864, ch. 217, 13 Stat. 365, following the entry of judgment against them; and (2) that petitioners' challenge based on an alleged violation of the Frisco Merger Order was barred by principles of res judicata. Petitioners apparently do not challenge the portion of the order upholding the district court's refusal to permit amendment of the complaint. However, they contend vigorously that the district court had jurisdiction to entertain their claim that formation of the holding company violated the Frisco Merger Order and that the court of appeals should not have found that principles of res judicata barred their arguments.[5] Petitioners' contentions do not warrant review by this Court.

The court of appeals correctly held that petitioners' challenge to the formation of the holding company based on an alleged violation of the Frisco Merger Order was barred by principles of res judicata. The court of appeals held at an earlier stage of this case (*BRAC III*; Pet. App. A-11 to A-12)

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[5] As the basis for their argument that formation of the holding company violates the Frisco Merger Order, petitioners cite a paragraph from Table D-7 (expenditures for additions and betterments) of Appendix D to that Order. The paragraph states (360 I.C.C. at 993):

> BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations.

that it lacked jurisdiction to consider petitioners' challenges to formation of the holding company, citing well established principles of primary jurisdiction. Petitioners did not seek review by this Court of the decision in *BRAC III*, but instead attempted to revive their challenges in the district court after the action had been dismissed. In the separate appeal from the decision of the Interstate Commerce Commission, the court of appeals rejected the merits of petitioners' claim (*BRAC I*). Again, petitioners failed to seek review of the court of appeals' holding. Thus, petitioners have had a full and fair opportunity to litigate both the issue of jurisdiction and the merits of their claim, and both the Commission and the courts have squarely addressed the various arguments. In each case petitioners chose not to seek review by this Court. The court of appeals correctly held that petitioners had no right to relitigate these issues. See, *e.g.*, *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398-402 (1981).

Petitioners suggest (Pet. 14-15) that their arguments are supported by the proposition that this Court will examine all earlier court decisions once a matter reaches it. But the cases they cite involved the failure to seek immediate review of interlocutory orders that contemplated further actions on remand, such as a new trial. See, *e.g.*, *Mercer* v. *Theriot*, 377 U.S. 152 (1964) (remand with possibility of submission of additional evidence and a new trial); *Stinson* v. *Atlantic Coast Line R.R.*, 355 U.S. 62 (1957) (remand for new trial). The cases do not suggest that a party may fail to petition for a writ of certiorari following a court of appeals judgment that finally disposes of a case, attempt to revive the same issues in the district court, and then seek certiorari on those issues after the court of appeals refuses to reconsider them. Nor do the cases suggest that a party may fail to petition for

a writ of certiorari in one action and then challenge that decision in a petition for review of a related, but separate, decision. Thus, the cases petitioners cite provide no precedent for their contentions here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983

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[6]Even if there were merit to petitioners' claim that the district court had jurisdiction to consider their challenge to the formation of the holding company and that claim were not barred by res judicata, review by this Court would not be warranted. The Commission concluded that formation of the holding company did not violate the paragraph from Table D-7 of the appendix to the Frisco Merger Order. See pages 2, 5 note 5, *supra*. As the court of appeals correctly noted (671 F.2d at 1088), great weight should be given to an agency's interpretation of its own orders, particularly when the order on its face supports that interpretation. See also Pet. App. A-9 to A-10, in which the district court expressed doubts about the strength of petitioners' claim on the merits without deciding whether or not it had jurisdiction of that claim.